No. 16271

UNITED STATES COURT OF APPEALS For The Ninth Circuit

MARY OZEROFF

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Dean W. Loney
of POWELL & LONEY
Attorneys for Appellant
P. O. Box 125
Kennewick, Washington

SUBJECT INDEX

TABLE OF CASES AND STATUTES

No. 16271

UNITED STATES COURT OF APPEALS For The Ninth Circuit

MARY OZEROFF

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Dean W. Loney
of POWELL & LONEY
Attorneys for Appellant
P. O. Box 125
Kennewick, Washington

A. STATEMENT OF PLEADINGS.

Appellee, United States of America, commenced this action in unlawful detainer against Appellant to recover possession of a private single family dwelling located in Richland, Washington (R 3-6). The action was commenced under authority of Title 28, U.S.C. Section 1345.

Appellant resisted the relief requested because of a failure to comply with the laws of the State of Washington (Revised Code of Washington, 59. 04 020) and the Disposal of Atomic Energy Communities, Act of 1955, Title 42 U.S.C. 2301, et seq.

B. STATEMENT OF CASE.

Appellant, Mary Ozeroff, moved into the single family dwelling house at 1525 Hains Street in Richland, Washington on or about October, 1951 (R. 15). She resided there with her brother, William John Ozeroff, until he moved in December, 1956 (R. 15).

Appellant then remained in the house on a month to month basis, paying the rent each month until May 1, 1957, at which time her tendered monthly rental was refused (R.12,24).

On October 28, Appellee posted a notice on the premises and mailed the notice as provided by the laws of the State of Washington, R.C.W. 59.12.040 (R. 8, 14) (Exhibit 1, R. 21).

In June of 1957, the Atomic Energy Commission commenced offering these Richland homes for sale (R. 11). The house occupied by Appellant is the only house of its type not offered for sale by the A.E.C. (R. 12).

At all material times, Appellant was ready, willing and able to purchase the house which had been her home over the past several years (R. 30). Appellant attempted this purchase on many occasions (R. 25).

By Appellee's own admissions, Appellant was eli-

gible for the home. Scout Reed, Housing Officer for the Atomic Energy Commission (R. 22), testified:

"The Court: Do they have to work for General Electric?

Answer: No, they have to be project-connected, which she is . . ." (R. 24).

Q. Well, even under the Purchase-Disposal Act she is a project-connected person, isn't she?

A. That is true, that is true.

Q. And neither the law nor the regulations promulgated under the law differentiates between the house at 1525 Hains and the house, for example, on Jadwin, both of them being single dwellings, there is no differentiation made, is there?

A. There is, it is true that a project-connected person who is eligible to buy one house would normally be eligible to buy another one, that is true . . ." (R. 28).

Q. Now, Miss Ozeroff was eligible for a lease from the General Electric Company, acting for [A.E.C.] (sic) General Electric Company, is that not right?

A. Yes, on the master list . . . ." (R. 29).

Appellee is ready and willing to sell the house but wants to sell to someone else. [Plaintiff's Answer No. 10 (R. 13) to defendant's interrogatory No. 10 (R. 17)]

C. SPECIFICATION OF ERRORS.

I. The notice to terminate tenancy was insufficient because it attempted to terminate the tenancy before the end of the rent-paying period.

II. The unlawful detainer action was improperly brought since the proper notice was not given and therefore

III. Appellant was entitled to purchase the home and therefore Appellee had no right to attempt an eviction.

D. ARGUMENT.

I. THE NOTICE WAS INSUFFICIENT.

Plaintiff's Exhibit 1 is the notice sent by Appellee attempting to terminate the tenancy (R. 21).

Appellee was not entitled to a judgment awarding a Writ of Restitution.

The premises were rented for an indefinite time with monthly rental reserved (R. 15, 9). The rental period was from the first of each month to the first of the next month.

The laws of the State of Washington provide as follows:

R.C.W. 59.04.020 Tenancy from month to month - Termination.

> When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of thirty days or more, preceding the end of any of said months or periods, given by either party to the other. [Code 1881 § 2054; 1867 p 101 § 2; RRS § 10619. Prior: 1866 p 78 § 1.]

R.C.W. 59.12.030 Unlawful detainer defined.

> A tenant of real property for a term less than life is guilty of unlawful detainer either:
>
> (2) When he, having leased property for an indefinite time with monthly or other

> periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him to quit the premises at the expiration of such month or period;

Compliance with these statutes requires that the notice terminate the tenancy at the end of the rent-paying period and be served at least 20 or, in some cases, 30 days before the end of this period.

The notice used in this case attempts to terminate the tenancy at least 10 days before the end of the month (Ex. I, R. 21).

The general rule as found in 86 A.L.R. 1349 is:

> "It may be stated generally that the notice given in order to terminate a tenancy must require that the tenancy terminate at the end of one of the recurring periods of the holding."

Implicit recognition of this rule by the Washington Court is found in Harris v. Halverson, 23

Wash. 779, 63 Pac. 549; Lowman v. Russell, 133 Wash. 10, 233 Pac. 9; and Worthington v. Moreland Motor Truck Co., 140 Wash. 528, 250 Pac. 30.

II. APPELLANT NOT GUILTY OF UNLAWFUL DETAINER.

The notice could only have required that the tenancy terminate on or after November 30, 1957. This was not the case, and the Appellee's action must therefore be dismissed. Appellant was not guilty of unlawful detainer since the notice did not require her to "quit the premises at the expiration of such month . . ." R.C.W. 59.12.030 (2).

III. APPELLANT WAS ENTITLED TO PURCHASE THE HOUSE.

In August, 1955, Congress enacted the DISPOSAL OF ATOMIC ENERGY COMMUNITIES ACT, 42 U.S.C. § 2301 et seq.

One of the stated policies was the desire to:

> (c) Provide for the orderly sale to private purchasers of property within those communities with a minimum of dislocation.
>
> 42 U.S.C. 2301 (c).

Appellant is the occupant, and the only occupant, of the house at 1525 Hains Street (R. 12). She is a "project-connected person" within the meaning of the Act (R. 24, 28, 29).

This is further borne out by 42 U.S.C. § 2346, entitled Occupancy by Existing Tenants. It provides in part:

> "Upon application by any occupant of a single . . . . house made within the period of first priority when such house is first offered for sale under this chapter, the Commission *shall* execute a lease to such occupant . . . ." (Emphasis supplied).

It stretches the meaning of the unlawful detainer statutes to find a tenant guilty in the face of these rights conferred by Congress. In answering the interrogatories, Appellee admits that in excess of 100 sales have been made to persons like Appellant (R. 13) and this house will be sold to anyone but Appellant (Interrogatory 10, R. 17, Answer 10, R. 13).

Congress has seen fit to tell the A.E.C.:

"The priorities *shall* . . .

> (c) give the occupant of a Government-owned single family house . . . . at least ninety days in which to

exercise the first right of priority; . . ."
42 U.S.C. 2332 (c)

The Government does not deny Appellant's rights to be an occupant of this type housing. But by these means the Government seeks to avoid its plain obligation to sell the home to Appellant by first evicting her and then denying her priority by claiming she is no longer an occupant.

IV. CONCLUSION.

The unlawful detainer action should be dismissed. The notice to vacate did not comply with the statutory mandate. After acceptance of Appellant as a tenant and occupant the Commission cannot defeat her priority rights by this method. With the Act of Congress granting Appellant right to lease or purchase, it cannot be urged that she is guilty of unlawful detainer.

Respectfully submitted,
Dean W. Loney
of Powell & Loney
Attorneys for Appellant
P. O. Box 125
Kennewick, Washington

APPENDIX

No. 16271

In the United States Court of Appeals for the Ninth Circuit

MARY OZEROFF, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General,
DALE M. GREEN,
United States Attorney,
Spokane, Washington,
ROBERT L. FRASER,
Assistant United States Attorney,
Spokane, Washington,
ROGER P. MARQUIS,
Attorney,
Department of Justice, Washington, D. C.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 16271

MARY OZEROFF, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court's oral opinion (R. 31–33) is not reported. The findings of fact and conclusions of law appear in the record at pages 33–37.

JURISDICTION

This is an appeal from a judgment of the district court entered June 25, 1958 (R. 37–38). Notice of appeal was filed August 12, 1958 (R. 39). The jurisdiction of the district court over this suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether appellant, who was admittedly in possession of property owned by the United States without

a lease, had sufficient and proper notice that the United States was terminating her possession under the unlawful detainer statutes of the State of Washington.

STATUTES INVOLVED

Pertinent sections of the Revised Code of Washington provide as follows:

> 59.04.050 *Tenancy by sufferance—Termination.* Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate immediately upon said demand.
>
> 59.12.030 *Unlawful detainer defined.* A tenant of real property for a term less than life is guilty of unlawful detainer either:
>
> * * * * *
>
> (6) A person who, without the permission of the owner and without color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing, is served upon him in the manner provided in RCW 59.12.040.
>
> 59.12.040 *Service of notice—Proof of service.* Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully

held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. * * *

STATEMENT

The uncontested facts of this case, as shown by the findings and pleadings, may be summarized as follows:

The United States, through its agent, the Atomic Energy Commission, has been the owner and manager of the premises known as 1525 Hains Street, Richland, Washington, during all times relevant to this action in connection with the Hanford Atomic Energy Project (R. 3, 34). Since May 1, 1957, appellant has resided on those premises without a lease and without the permission of the United States (R. 3–4, 34). Appellant has never held a lease of the premises (R. 8, 14). Prior to May 1, 1957, appellant had lived on the premises with her brother who held a lease from the United States in his own name (R. 10, 15). Since her brother's departure and the termination of his lease, appellant has remained in possession of the

house on the premises and refused to surrender possession. Although she offered to pay rent on the premises, the Government refused to accept her tender of rentals because under applicable statutes and regulations appellant was not entitled to rent the premises (R. 24–25). The record shows that appellant was claiming a priority right to purchase this property but that Government officials refused her offer because of her lack of qualifications under the statutes and regulations.

On October 28, 1957, the United States in compliance with the unlawful detainer statutes of the State of Washington gave notice in writing to appellant that she would be required to vacate the premises by November 20, 1957 (R. 21). Since appellant was not found at the premises at the time of service, the notice was served by affixing a copy of the notice on the door of the dwelling on the premises and by mailing a copy personally addressed to appellant at that location (R. 4–5, 35). Appellant still refused to vacate and the United States, on December 4, 1957, filed this action to have appellant adjudged guilty of unlawful detainer of the premises, to obtain a writ of restitution ousting her from the premises and restoring possession to the United States, and to obtain judgment for the fair rental of the premises for the period of appellant's unlawful possession (R. 3–6). After answer to interrogations and requests for admissions had been filed (R. 8–20), trial was held on June 11, 1958, and on June 25, 1958, the district court granted the full relief requested by the United States (R. 37–38). The court expressed sympathy for appellant but

ruled that she did not have a priority right and that there had been substantial compliance with notice requirements (R. 31–32). This appeal followed (R. 39).

ARGUMENT

I

THE NOTICE TO VACATE THE PREMISES WAS SUFFICIENT AND PROPER UNDER THE STATUTES OF WASHINGTON IN LIGHT OF THE CIRCUMSTANCES OF THIS CASE

At the outset, it should be emphasized that appellant's written admissions reveal that she has never held a lease on the instant premises (R. 8, 14). Yet her objection to the notice given by the United States relates solely to the contention that, as a month-to-month tenant, she must have notice to vacate at least 20 days before the end of the rent-paying period. Her argument proceeds to assert that even though notice here was served October 28 and the vacating date set at November 20, such notice of 23 days was not sufficient because she could not be forced to vacate until the end of the month, i.e., November 30.

The obvious answer to this contention is that appellant was never a month-to-month tenant of this property. Since she was in possession of the premises without a lease and without permission of the owner (R. 34), her "tenancy" is the classic example of a tenancy by sufferance, and under RCW 59.04.050, *supra,* p. 2, she was entitled to no notice in advance. Rather, a tenant by sufferance must surrender possession on demand, as well as pay reasonable rent for

the actual time the premises were unlawfully occupied. At the most, appellant was entitled only to three days' notice under subsection (6) of RCW 59.12.030, *supra,* p. 2, which describes a person in unlawful detainer as one who, "without permission of the owner and without color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice in writing is served upon him in the manner provided in RCW 59.12.040." Since appellant received well over three days' notice in writing and since she admits that she properly received that notice under the provisions of RCW 59.12.040 (R. 8, 14, 20), there remains no substance to her contention that the notice served was insufficient.

Although we believe that the above argument is dispositive of this appeal, it should be noted that even if appellant had been a month-to-month tenant, she could not successfully attack the notice given to her in this case. The purpose of a notice to vacate is to inform the tenant in possession of the owner's intent to oust him (or, assuming a lease, to terminate the lease). The mere fact that appellant—if a month-to-month tenant—legally could not have been evicted until the end of November, rather than November 20 as stated in the notice, could not possibly have prejudiced her rights in any manner. The notice was clear and unequivocal, and adequately described the premises. In *Worthington* v. *Moreland Motor Truck Co.,* 140 Wash. 528, 250 Pac. 30 (1926), a case involving the sufficiency of notice under a statute requiring 30 days' notice, notice was given November 3. The

court held that, while the lease would not terminate on November 30, it would terminate on December 31 without further notice. Although that case involved notice given by a tenant, it does illustrate the view of the Washington courts that a reasonable compliance with the notice statutes is sufficient. In *Provident Mutual Life Ins. Co.* v. *Thrower,* 155 Wash. 613, 285 Pac. 654 (1930), in speaking of a notice to vacate, the court at p. 617 stated that "As to the form and contents of the notice or demand, a substantial compliance with the statute is sufficient." To the same effect are *Erz* v. *Reese,* 157 Wash. 32, 288 Pac. 255 (1930), and *Davis* v. *Jones,* 15 Wash. 2d 572, 131 P. 2d 430 (1942). Cf. 31 Wash. L. Rev. 51 (1956). In the instant case appellant had knowledge of the eviction on October 28, and even if she could not have been forced to move until the end of a monthly rental period, she would have had to vacate on November 30, 1957. This action by the United States was instituted on December 4, 1957. Plainly, even under appellant's misconception that she had the status of a month-to-month tenant, the notice in this case was sufficient under the statutes and decisions of the State of Washington.

II

APPELLANT'S ALLEGED PRIORITY RIGHT TO PURCHASE CONSTITUTES NO DEFENSE TO THIS ACTION

A. *There was no issue properly before the district court relating to appellant's right to purchase the house on the premises:*—Appellant attempts (Br. 7–9) to inject an issue into this appeal that was not before

the district court by any pleading whatsoever and which is totally irrelevant to the unlawful detainer action brought by the United States. The findings of fact, conclusions of law and judgment of the district court neither mention nor purport to decide the issue of whether appellant was entitled to purchase the house on the premises here involved. Under such circumstances, this irrelevant issue cannot now be forced into the case. *Century Furniture Co.* v. *Bernhard's Inc.,* 82 F. 2d 706 (C.A. 9, 1936); *DeJohn* v. *Alaska Matanuska Coal Co.,* 41 F. 2d 612 (C.A. 9, 1930).

It is equally clear that the district court could not have entertained this contention—whether formally raised by a counterclaim or developed in the hazy fashion of this case—since a suit by the United States on one issue (here, unlawful detainer) does not allow the defendant to inject into the action collateral issues on which the United States has not consented to suit (here, the right of appellant to purchase the house on the premises). This is so because "[t]he objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it." *United States* v. *Shaw,* 309 U.S. 495, 503 (1940); *Nassau Smelting Works* v. *United States,* 266 U.S. 101, 106 (1924); *Illinois Central R.R. Co.* v. *Public Utilities Comm.,* 245 U.S. 493, 504–505 (1918). See also *United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 512–514 (1940); *United States* v. *Fin,* 239 F. 2d 679 (C.A. 9,

1956); *Waylyn Corp.* v. *United States,* 231 F. 2d 544, 547 (C.A. 1, 1956); *United States* v. *Hosteen Tse-Kesi,* 191 F. 2d 518 (C.A. 10, 1951). Moreover, the only jurisdiction of affirmative claims against the United States vested in the court below is for money judgments under the Tucker Act or Tort Claims Act. Cf. *New Haven Public Schools* v. *General Services Administration,* 214 F. 2d 592 (C.A. 7, 1954). In *Blanc* v. *United States,* 244 F. 2d 708 (C.A. 2, 1957), the court said (p. 709): "The consent of the United States to be sued under the Tucker Act is limited to suits for the recovery of a money judgment and any incidental relief in equity in aid of such a judgment." See also *United States* v. *Jones,* 131 U.S. 1, 19 (1889).

B. *Appellant has no priority right to purchase the house:*—Appellant's attempt to classify herself as an "occupant" of this particular dwelling ignores the definition of that term as set forth in the Atomic Energy Community Act of 1955, 42 U.S.C. secs. 2301 *et seq.,* 69 Stat. 473. Section 2304(g) of that Act states:

> The term *"occupant" means a person* who, on the date on which the property in question is first offered for sale, is *entitled to residential occupancy* of the Government-owned house in question, or of a family dwelling unit in such house, *in accordance with a lease or license agreement* with the Commission or its property-management contractor. (Emphasis supplied).

Thus, in view of appellant's admission that she has never held a lease on these premises, even a superficial investigation of appellant's argument in Point III of

her brief discloses the lack of any merit in her claim of the right to purchase the dwelling on the premises. Moreover, at the trial the Housing Officer for AEC made it clear that it is the administrative view under the regulations that the lease on that particular house could be transferred only to wives whose husbands have died or to separated wives who work (R. 25). Not being in either of these categories, appellant was ineligible to lease or purchase. See 10 CFR 130.1, 130.21.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court was correct and should be affirmed.

Respectfully.

PERRY W. MORTON,
Assistant Attorney General.
DALE M. GREEN,
United States Attorney,
Spokane, Washington.
ROBERT L. FRASER,
Assistant United States Attorney,
Spokane, Washington.
ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D.C.

MAY 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959